W MOHD SAFIE W MUSTAFFA v. PP

HIGH COURT MALAYA, KUALA TERENGGANU
ABDUL WAHAB MOHAMED JC
[CRIMINAL APPEAL NO: TA-42S-13-09-2017]
5 MARCH 2019

CRIMINAL LAW: *Penal Code – Section 377E – Offence of inciting child to act of gross indecency – Whether elements of charge proved – Whether prosecution successfully established prima facie case*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Appeal against decision of Sessions Court – Accused person found guilty and convicted for offence of inciting child to act of gross indecency – Accused person sentenced to five years' imprisonment and eight strokes of whipping – Whether conviction and sentence safe – Penal Code, s. 377E*

CRIMINAL PROCEDURE: *Charge – Defective – Accused person charged for offence of inciting child to act of gross indecency – Whether sexual misconduct continuing offence – Whether specific date of alleged commission of offence stated in charge – Whether charge defective – Penal Code, s. 377E*

EVIDENCE: *Witness – Child witness – Accused person charged for offence of inciting child to act of gross indecency – Whether child credible witness – Whether testimony ought to be believed and accepted – Penal Code, s. 377E*

The appellant, a teacher of a Ma'ahad Tahfiz, a religious school where the students study the al-Quran, was charged at the Sessions Court, for inciting a child to an act of gross indecency, an offence under s. 377E of the Penal Code ('PC'). The charge was later amended to state that the offence was committed between the months of May and June 2016. After conducting an inquiry, the Sessions Court Judge ('SCJ') was satisfied that the victim ('SP6'), a student at the school, possessed sufficient intelligence and was a competent witness. According to SP6, (i) he attended the school every Sunday to Wednesday from 8pm to 10pm (ii) the appellant had taken off his and SP6's pants and placed SP6 in a sitting position and then placed his hand on SP6's thigh and his genitals on SP6's anus; and (iii) the incident was estimated to have occurred 30 times. The matter was uncovered when SP6 told his cousin ('SP10'), also a victim, who, in turn, told his father ('SP4') and mother ('Siti Aishah'). SP10 then lodged a police report ('P3') against the appellant. At the conclusion of the trial, the appellant was found guilty and convicted as per the charge and sentenced to an imprisonment of five years and eight strokes of whipping. Hence, the present appeal. In support of his appeal, the appellant submitted that (i) sexual misconduct is not a continuing offence and a single offence, such as the offence of inciting a child to an act of indecency, could not be committed between the months of May and June 2016, as per the charge. The appellant was prejudiced as there was no specific date of the offence stated in the charge; (ii) SP4 made the police report after hearing the

A story from Siti Aishah who was not called to testify thus rendering P3 a hearsay evidence; and (iii) the prosecution failed to call the identification parade officer and such failure prejudiced the appellant.

Held (dismissing appeal):

B **(1)** SP6 had, at all times, maintained the same story, indicating the likelihood that the complaint was true. There was no reason to disturb the finding of the SCJ who had the opportunity to evaluate the understanding and intelligence of SP6 before accepting his unsworn evidence. The fact that the evidence of SP6 was supported by other material particulars, established him as a credible witness. The C appellant's defence, on the other hand, did not raise a reasonable doubt on the prosecution's case and, as such, the appellant was correctly convicted for the offence. (paras 42, 48 & 56)

(2) The charge sufficiently set out all the particulars, required under s. 377E D of the PC, as well as the ingredients of the offence. The amendment did not involve any addition, but only an alteration to the charge, and had not occasioned any miscarriage of justice to the appellant. The amendment was not substantial and had not prejudiced the appellant as there was no defence of alibi raised by the appellant. Applying s. 422 E of the Criminal Procedure Code, the amended charge was not defective in law. (para 26)

(3) P3 was made by SP4 in the presence of SP5, SP6 and SP10 where SP4 had stated that the report was made on behalf of SP10 and SP6. This was not a case involving statements made to witness by a person not called F as a witness during trial. In this case, SP4 asked SP6 and heard the answer from SP6. Besides, SP5, SP6 and SP10 were called as witnesses to give evidence in court. Therefore, P3 was not hearsay and it fell under s. 60(1)(b) of the Evidence Act 1950. (para 33)

(4) SP6 identified the appellant by way of dock identification. The evidence G of the identification parade officer was not essential to the unfolding of the narrative upon which the prosecution was based. Therefore, the failure to call the identification parade officer, as a witness, was not material. (para 46)

Case(s) referred to:

H *Alandu Santhanasamy v. PP [2013] 1 LNS 1019 CA* ***(refd)***
Chao Chong & Ors v. PP [1959] 1 LNS 11 HC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Ghasem Hozouri Hassan v. PP [2018] 6 CLJ 133 FC ***(refd)***
Kesavan Senderan v. PP [1999] 1 CLJ 343 HC ***(refd)***
I *Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA* ***(refd)***
Lee Kwai Heong & Anor v. PP [2006] 1 CLJ 1043 CA ***(refd)***
Lew Cheok Hin v. Regina [1956] 1 LNS 55 HC ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Md Zainudin Raujan v. PP [2013] 4 CLJ 21 FC ***(refd)***

Mohammad Hasnizam Hussein v. PP [2015] 1 LNS 433 CA ***(refd)***
Muthusamy v. PP [1947] 1 LNS 71 HC ***(refd)***
P'ng Hun Sun v. Dato' Yip Yee Foo [2013] 1 LNS 320 CA ***(refd)***
Periasamy Sinnappan v. PP [1996] 3 CLJ 187 CA ***(refd)***
Pie Chin v. PP [1983] 1 LNS 70 HC ***(refd)***
PP lwn. Mohamad Malek Ridhzuan Che Hassan [2013] 8 CLJ 359 CA ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Ng Lai Huat & Ors [1990] 1 CLJ 1190; [1990] 2 CLJ (Rep) 774 HC ***(refd)***
Ratten v. R [1972] AC 378 ***(refd)***
Siew Yoke Keong v. PP [2013] 4 CLJ 149 FC ***(refd)***
Teper v. R [1952] 2 All ER 447 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 3, 158, 182A, 316, 422
Evidence Act 1950, ss. 60(1)(b), 114(g), 133A
Penal Code, s. 377E

For the plaintiff - DPP
For the defandant - M/s Firdaus & Partners

[Editor's note: Appeal from Sessions Court; Criminal Case No: KT-62JS-08-6-2016]

Reported by Najib Tamby

JUDGMENT

Abdul Wahab Mohamed JC:

Introduction

[1] This is an appeal by the appellant against the decision of the Sessions Court. The appellant in this case was found guilty and convicted under s. 377E of the Penal Code by the Sessions Court Judge ("SCJ") and was sentenced to imprisonment of five years and eight strokes of whipping.

[2] The initial charge preferred against the appellant was as follows:

> Bahawa kamu pada 1/6/2016 jam lebih kurang 8 malam, di Maahad Tahfiz Al Ikhwan No. 1334 Jalan Kenanga, Batu Buruk Kuala Terengganu, didapati telah merangsang penama IIAS kpt xxx (8 tahun) untuk melakukan suatu perbuatan kelucahan melampau. Oleh yang demikian kamu telah melakukan suatu kesalahan yang mana boleh dihukum di bawah Seksyen 377E Kanun Keseksaan.

[3] However, this charge was amended at the end of prosecution's case which reads as follows:

> Bahawa kamu pada **antara bulan Mei sehingga Jun 2016** dan jam lebih kurang 8 malam, di Maahad Tahfiz Al Ikhwan No. 1334 Jalan Kenanga, Batu Buruk Kuala Terengganu, didapati telah merangsang penama IIAS kpt xxx (8 tahun) untuk melakukan suatu perbuatan kelucahan melampau. Oleh yang demikian kamu telah melakukan suatu kesalahan yang mana boleh dihukum di bawah Seksyen 377E Kanun Keseksaan.

The amended part as emphasised above.

A **Facts Of The Case**

[4] The victim in this case was IIAS (SP6) who was a student at Ma'ahad Tahfiz Al-Ikhwan ("the school") where students study al-Quran. SP6 attended the school every Sunday to Wednesday during the night session between 8pm to 10pm.

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[5] The appellant was one of the teachers at the said school as confirmed by the principal of the school Badrul Salleh Burhandin Fadzullah bin Abd Rahman (SP3). SP3 further confirmed that the appellant taught at the school during the night session with one other teacher named Ustaz Mohamad Azmi.

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[6] SP6 had confirmed that the appellant was the teacher teaching him at the school. The accused was also living at the school with his wife and a son as permitted by SP3.

[7] SP6 claimed that the appellant had taken off SP6's pants and his own pants and had placed SP6 on him in a sitting position. SP6 further alleged that the appellant had placed his genital at SP6's anus and his hand on SP6's thigh. The said incident was claimed to have occurred at the toilet located near the appellant's place of residence.

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[8] During the said incident, SP6 claimed that the appellant would give SP6 his handphone so as to distract SP6 with games contained in the handphone. SP6 claimed that such incident had occurred estimated 30 times. SP6 further claimed that the offence was committed not only at the toilet, but also at the appellant's place of residence.

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[9] SP6 had told his cousin Muhammad Alif Iman bin Mohd Ramlan (SP10) about the said incident. SP10 had also claimed that the appellant had committed the same offence against SP10 himself. This matter was uncovered when SP10 told his parents about what the offence committed against him.

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[10] SP6 was then referred to the medical expert Doktor Maliza binti Awang (SP11) whom had confirmed that there were no injuries found on the anus of SP6 and that it was in a normal condition.

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The Law On Appeal

[11] The duty upon this court hearing an appeal from a subordinate court is set out in s. 316 of Criminal Procedure Code (CPC) as follows:

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316. Decision on appeal

At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may:

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(a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction or in an appeal as to sentence:

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or

(ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;

(c) in an appeal from any other order, alter or reverse such order.

[12] In considering this appeal, I am also guided by the principle reiterated by the Court of Appeal in *Mohammad Hasnizam Hussein v. PP* [2015] 1 LNS 433; [2015] MLRAU 172 whereby His Lordship Abang Iskandar Abang Hashim JCA reminded that the true nature of an appeal is a continuation of hearing concerning both findings of facts and law where all evidence are opened to re-examination to determine if they have been correctly made by trial court:

> [12] ... It must be noted here that there was no grounds decision supplied by the trial Judge but to our mind, that would not be an issue because an appeal is a continuation of a trial and the appeal justices can review all the available materials in the Record of Appeal ("ROA") before they arrive at their decision at the end of the appeal before them. One would need only to recall the words of Justice Abdul Hamid Omar J [as he then was] in the case of *PP v. Ma'arif* [1969] 1 LNS 134; [1969] 2 MLJ 65 to be reminded of the true nature of an appeal that is concerned with both findings of facts as well as of law. We reproduce what the learned judge had said, having also cited the case of *In Re AB Ltd* [1956] 1 LNS 97; [1956] 1 MLJ 197, in the report, as follows:
>
> > An appeal is merely a continuation of a trial, and throws open all the evidence to re-examination in order to determine whether or not the various findings of the court are correct.

[13] In the case of *Periasamy Sinnappan v. PP* [1996] 3 CLJ 187; [1996] 2 MLJ 557, Gopal Sri Ram JCA, (as His Lordship then was) had this to say:

> In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.
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> In *Lim Kheak Teong v. PP* [1984] 2 CLJ 219; [1984] 1 CLJ Rep 207; [1985] 1 MLJ 38, the sessions court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction. The accused applied under the now repealed s. 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ, Malaya) said (at pp 39-40):

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> ... we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v. King-Emperor* AIR [1934] PC 227 and secondly purporting to follow Terrell Ag CJ in *R v. Low Toh Cheng* [1941] MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.

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> With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred 'the High Court should and will always give proper weight and consideration to such matters' as:

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> (1) the views of the trial judge on the credibility of the witnesses;
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> (2) the presumption of innocence in favour of the accused;
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> (3) the right of the accused to the benefit of any doubt; and
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> (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

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> Lord Reid reiterated this same principle in *Benmax v. Austin Motor Co Ltd* [1955] AC 370 at p. 375 where he quoted from Lord Thankerton's judgment in *Watt (or Thomas) v. Thomas* [1947] 1 All ER 582 that:

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> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

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> The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused.' Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Watt (or Thomas) v. Thomas*). On the facts of this case we do not think so.

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> In *Wilayat Khan v. State of Uttar Pradesh* AIR 1953 SC 122 at pp 123 and 125, Chandrasekhara Aiyar J, when delivering the judgment of the Supreme Court said:

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> Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end; the second is that great weight should be attached to the view taken by the sessions judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses.

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...

Interference with an order of acquittal made by a judge who had the advantage of hearing the witnesses and observing their demeanour can only for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the evidence or the facts.

[14] The principles of the law with regard to appeal was clearly explained by the Court of Appeal in the case of *P'ng Hun Sun v. Dato' Yip Yee Foo* [2013] 1 LNS 320 as follows:

When the finding of the trial judge is factual, however, the fact finder's decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong (see *China Airline Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163); *Zaharah bt A Kadir v. Ramuna Bauxite Pte Ltd & Anor* [2011] 1 LNS 1015, *Kyros International Sdn Bhd. v. Ketua Pengarah Hasil Dalam Negeri* [2013] 1 LNS 1). The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that:

(a) by reason of some non-direction or mix-direction or otherwise the judge erred in accepting the evidence which he or she did accept; or

(b) in assessing and evaluating the evidence the judge has taken into account some mater which he or she ought not to have taken into account, or failed to take into account some matter which he or she ought to have taken into account; or

(c) it unmistakenly appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses' or

(d) in so far aside judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.

[15] In *PP lwn. Mohamad Malek Ridhzuan Che Hassan* [2013] 8 CLJ 359, Mohd Zawawi Salleh JCA (as he then was) having referred to *P'ng Hun Sun* (*supra*) had expressed his views as follows:

[13] Kesimpulan yang boleh dibuat daripada kes-kes di atas ialah Mahkamah Rayuan adalah berkewajipan untuk mengganggu sesuatu keputusan mahkamah bicara sekiranya didapati mahkamah bicara tersebut telah secara serius menyalaharahkan dirinya sehingga seseorang boleh menyatakan dengan selamat bahawa tidak terdapat mana-mana mahkamah yang bertindak secara wajar dan yang dengan betul mengarahkan dirinya serta bertanyakan soalan-soalan yang betul, akan membuat keputusan yang sama. (Lihat *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545).

[16] Reference was also made to the Court of Appeal case of *Alandu Santhanasamy v. PP* [2013] 1 LNS 1019, where Hamid Sultan bin Abu Backer JCA had stated as follows:

> It is well settled that it is in the hands of the trier of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction. In so doing if the court orders an acquittal or conviction it cannot be set-aside by the appellate court unless it records a finding that the view taken by the trial court was not a possible reasonable view of the evidence on record. (See *Pramod Mandal v. State of Bihar (SC)* [2004] 4 LRI 24; *PP v. Thenegaran a/l Murugan* [2013] 5 CLJ 850; [2013] 3 MLJ 328)

[17] In view of the above authorities, it is trite law that an appellate court would be very reluctant and hesitant to disturb a finding of fact made by trial judge whom had the audio and visual advantage of observing and assessing witnesses testifying before him, something which the appellate court does not possess. Nevertheless, it would be open to an appellate court to interfere with the finding made by a trial judge if such finding was not supported by evidence or the decision was against the weight of the evidence or there was no proper judicial evaluation of the evidence or there was misdirection in law or the trial court had fundamentally misdirected itself.

[18] Bearing the above principles in mind, I hereby proceed to consider the grounds of judgment of the SCJ in order to determine whether the respondent had proven the charges against the appellant. It is pertinent for me to begin by stating the trite principle relating to the onus upon whom an offence is required to be proved against an accused person lies with the prosecution that bears the burden to prove its case beyond reasonable doubt.

[19] The principal issue to be considered was whether the learned SCJ was correct in convicting the appellant for an offence under s. 377E of the Penal Code based on circumstantial evidence as alluded to in the grounds of judgment. It is that in such case, the evidence must point irresistibly to the conclusion of guilt of the accused and the accused alone and that every possible explanation other than the guilt of the accused has been excluded (see *Magendran Mohan v. PP* [2011] 1 CLJ 805).

The Amendment Of The Charge

[20] It was the appellant's submission that sexual misconduct is not a continuing offense but a single offense, as such, the offence of inciting a child to an act of indecency cannot be committed between the month of May and June 2016 as per the charge against the appellant. It was therefore the appellant's contention that the amended charge was defective as there was no specific date of offence stated in the said charge which was prejudicial to the appellant.

[21] The amendment made was based upon evidence given by the prosecution witness especially SP6. SP6 had in an interrogation by SP8 (exh. P5) stated that the said offence was last committed by the appellant against him on a "Sunday". SP6 had in his recorded statement stated that the offence was last committed by the appellant against him on 1 June 2016 which was a Wednesday.

[22] In view of the above discrepancy, I proceeded to refer to the oft-quoted case of *Muthusamy v. PP* [1947] 1 LNS 71; [1948] 1 MLJ 57 where Taylor J had held as follows:

> Differences may be divided into four classes:
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> (a) Minor differences, not amounting to discrepancies;
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> (b) Apparent discrepancies;
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> (c) Serious discrepancies;
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> (d) Material contradictions.
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> Minor differences are attributable mainly to differences in interpretation and the way in which the statement was taken and sometimes to differences in recollection. A perfectly truthful witness may mention a detail on one occasion and not remember it on another. A mere omission is hardly ever a discrepancy ... .

[23] Also in the case of *Pie Chin v. PP* [1983] 1 LNS 70; [1985] 1 MLJ 234, Wan Yahya J (as he then was) had stated as follows:

> It is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded. Forgetfulness and failure to recall exactly certain events, which did not seem to be important to the witness, do not necessarily shake his credibility or render other parts of his story unworthy of belief. Various persons are endowed with varying powers of cognition, attentiveness and perception, so that it is not uncommon for two witnesses to a common event to describe it in slightly differing versions.

[24] The SCJ in his decision had observed the said discrepancies and found that the SP6's evidence was nonetheless consistent with that of SP5 ie, that SP6 studied at Ma'ahad Tahfiz every Sunday until Wednesday as well as that of SP3 whom had confirmed that the appellant was still employed at the said Ma'ahad Tahfiz between the period of May to June 2016. The SCJ further took into consideration the tender age of SP6 and the number of times the said offence had been committed against SP6 and opined as follows:

> Di samping itu juga, faktor usia yang masih lagi kecil dan juga perkara ini sudah berlaku banyak kali sehingga SP-6 sendiri keliru untuk merujuk kepada Tarikh yang mana satu menyebabkan SP-6 tidak dapat mengingati tarikh kejadian tersebut.

[25] Having carefully scrutinised the record of appeal, I accept the SCJ's evaluation that SP6 may not be lying about the date of occurrence and that he may be confused as the incident had happened many times and SP6 did not immediately inform anyone about the said incident. Section 158 of the CPC further allows for the court to alter or add to any charge at any time before judgment is pronounced. A plain reading of the charge clearly states the offence of which the appellant was charged with. It is also clear from the appellant's testimonial evidence that the amendment did not in any way mislead the appellant as to the offence charged with as he was able to answer his charge. Reference was made to the case of *Lee Cheok Hin v. Regina* [1956] 1 LNS 55; [1956] MLJ 131, at p. 133, per Taylor J where it was said:

> The fundamental principle is that the offence must be stated with sufficient precision to enable the accused to meet the charge. As regards cheating it is specifically enacted by s. 153 that the manner in which the victim was cheated must be set out. It is the duty of the Court to scrutinise the charge at the commencement of every summary trial. An amendment may be made at any stage and, in general, the earlier the better but it is at the close of the evidence for the prosecution that the Court is in the best position to decide exactly what is the case which the accused is required to meet. It is therefore the express statutory duty of the lower Courts to consider every charge at that stage and if necessary to amend it then. This is a point of forensic procedure and quite apart from the legal provisions regarding the framing of charges which relate mainly to practice in the prosecutor's chambers. It is a mandatory provision which should always be strictly observed. In my view, however, it does not exclude either earlier or later amendment for particular reasons or conviction, in proper cases, of an offence not formally charged.

[26] Having carefully scrutinised the evidence before me, I am of the considered view that the charge as framed had sufficiently set out all the particulars as required under s. 377E of the Penal Code as well as the ingredients of the offence. I further find that the amendment did not involve any addition but only an alteration to the charge and in all the circumstances had not occasioned any miscarriage of justice to the appellant. The said amendment was not substantial and had not prejudiced the appellant as there was no defence of alibi raised by the appellant. In any event, applying s. 422 of the CPC, the amended charge preferred against the appellant was not rendered defective in law.

Whether Content Of FIR P3 Was Hearsay

[27] Counsel for the appellant submitted that SP4 had made the police report P3 after having heard the story from his wife, Siti Aishah whom is not called to testify in this case. Failure to call Siti Aishah to testify rendered the said P3 as hearsay evidence.

[28] In *PP v. Ng Lai Huat & Ors* [1990] 1 CLJ 1190; [1990] 2 CLJ (Rep) 774, Faiza Tamby Chik JC (as he then was) said in this way relating to hearsay evidence at p. 777:

> The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has long been established as a fundamental principle of the law of evidence.
>
> What is hearsay evidence? Evidence by a witness of what another person has stated (whether verbally, in writing or otherwise) on a prior occasion is inadmissible for the purpose of proving that any fact stated by that person on such prior occasion is true. The hearsay rule will be infringed where reliance is placed on the evidence of someone not before the court where the evidence is adduced in order to prove that the facts as stated are true.

[29] And in *Teper v. R* [1952] 2 All ER 447, Lord Normand said:

> The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.

[30] His Lordship went on to say as follows:

> The hearsay rule does not apply where the purpose of adducing the evidence is to show not the truth of what was said but that the statement was in fact made. The relevance of such evidence, called original evidence, is revealed by the leading case of *Subramaniam v. PP*.

[31] His Lordship also cited the English case of *Ratten v. R* [1972] AC 378, where Lord Wilberforce at p. 387 said, *inter alia*:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

[32] Based on the record of evidence, SP10 told his mother, Siti Aishah in the presence of his father, SP4 that the appellant had committed an offence against him. SP4 then told SP5 about the said incident. SP5 then asked SP6 if the same had been done to him by the appellant to which SP6 had answered in the affirmative. SP4 had also asked SP6 about the offence committed against SP6 by the appellant, SP6 told SP4 that the appellant had inserted 'angry bird' into Izzat's anus.

[33] P3 was made by SP4 in the presence of SP5, SP6 and SP10 where SP4 had stated that the said report was made on behalf of SP10 and SP6. Evidently, this is not a case involving statement made to a witness by a person not called as a witness during trial. Reference is also made to

s. 60(1)(b) of the Evidence Act 1950. In this case, SP4 asked the victim, SP6 and heard the answer from SP6. Besides, SP5, SP6 and SP10 were all called as witnesses to give evidence in court. Therefore P3 is not a hearsay and it falls under s. 60(1)(b) of the Evidence Act 1950.

Evidence Of SP6 As Child Witness

[34] From the record of appeal, it shows that an inquiry was held by the learned SCJ pursuant to s. 133A of the Evidence Act 1950, as far as the SP6's evidence was concerned and the learned SCJ was satisfied that SP6 possessed sufficient intelligence and was a competent witness. The learned SCJ nonetheless cautioned himself as to the danger of convicting the appellant of the offence charged with on the evidence of SP6 unless such evidence is corroborated by some other material evidence in support thereof implicating him. The reason for such requirement was explained in the case of *Chao Chong & Ors v. PP* [1959] 1 LNS 11 where Thomson CJ said:

> One reason why children's evidence is regarded with suspicion is that there is always the danger that a child may not fully understand the effect of taking an oath. In this country where evidence is taken on affirmation that consideration loses much of its force. Another reason, however, which in this country possesses undiminished force is that it is a matter of common knowledge that children at times find it difficult to distinguish between reality and fantasy. They find it difficult after a lapse of time to distinguish between the results of observation and the results of imagination.

[35] I am mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. The general principle is that the conclusion of a trial judge is a finding of fact on the oral evidence based on the demeanour and credibility of the witnesses before him or her. Generally, such finding ought not be disturbed unless the appellate court is convinced that it is plainly wrong. It would not be sufficient to warrant any interference merely because the appellate court entertains doubt whether such finding is right. In *Lee Kwai Heong & Anor v. PP* [2006] 1 CLJ 1043, the Court of Appeal in observing this, stated as follows:

> [16] In respect of the contention that the learned trial judge erred in his assessment of the evidence of PW7 and accepting him as a witness of truth, with respect, we are of the view that it is a settled principle of law that 'where the judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be; and the appellate tribunal will generally defer to the conclusion which the trial judge has formed' and if an appeal is 'from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen,' an appellate court 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong'. (See: *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 243; *AD Caldeira v. FA*

> *Gray* [1934] 1 LNS 5; [1936] MLJ 137 PC; *Loh Shak Mow v. Public Prosecutor* [1986] 1 LNS 47; [1987] 1 MLJ 362 (also [1986] SLR 358). And in order to be convinced that the decision of a trial judge is wrong an appellate court has a duty 'to check by critical examination of the whole of the evidence the trial judge's conclusion as to the truthfulness of that witness'

(See also *Lee Ing Chin & Ors v. Gan Yook Chin* [2003] 2 CLJ 19, *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[36] The learned SCJ had in his evaluation found that SP6 had been consistent in his evidence and was not shaken under cross-examination. SP6 was able to describe the indecent act committed by the appellant in detail and SP6 had in his re-enactment used dolls to show the position he was in during the occurrence of the said offence. SP6 in his evidence had stated that the appellant had brought into his room and asked him to sit on a "lembek" ("mattress"), which he was able to identify the said mattress in exh. P2G which is a photo of the appellant's room.

[37] The rule to corroboration is a rule of prudence. Prudence requires that the evidence of a child be corroborated before being acted upon, but if the court finds no reason why the child should not be believed, it may act upon his testimony even if there is no corroboration (see *Kesavan Senderan v. PP* [1999] 1 CLJ 343).

[38] The facts showed that the trial judge had observed SP6's demeanour, and had specifically concluded that SP6 was a credible witness and that his testimony, in fact, was being corroborated in material particulars by other witnesses specifically SP5, SP11 and SP8.

[39] SP5 had in his evidence stated that SP6 was attending the school every Sunday to Wednesday between 8pm to 10pm SP6, after having been enquired by SP5, had told SP5 about the offence committed by the appellant against him. It was also SP5's evidence that there was an occasion when SP6 had cried and refused to attend the school.

[40] SP11 having conducted physical examination on SP6's anal did not find any injuries but she did not rule out the possibility of friction on SP6's anus in view of the factors relating to the ability of the anus muscle that may contract and relax. This is a relevant factor as considered by the learned SCJ as follows:

> ... masa kejadian tersebut berlaku telah berlaku beberapa hari sebelum pemeriksaan ke atas dubur SP-6 dilakukan oleh SP-11. Ini menyebabkan otot-otot di permukaan dubur tersebut telah kembali kepada keadaan normal. Fakta ini juga sangat relevan memandangkan kes ini bukan kes yang dilaporkan oleh mangsa sejurus selepas perbuatan kelucahan tersebut berlaku atau terjadi. Ini adalah kerana kes ini telah ditimbulkan oleh mangsa hanya selepas satu tempoh yang lama.

[41] SP8 having interrogated SP6 at the Pusat Temuduga Kanak-Kanak stated that SP6 was able to narrate the occurrence of incident involving the appellant and himself clearly and in great detail. SP6 was able to understand the question asked and was able to provide with the correct and logical answer.

[42] In view of the above reasons, it is evident that SP6 had maintained at all times the same story, thereby indicating the likelihood that the complaint is true. I find no reason to disturb the finding of the learned SCJ who had the opportunity to evaluate the understanding and intelligence of SP6 before accepting the unsworn evidence of SP6.

Section 114(g) Of The Evidence Act 1950

[43] It was the appellant's submission that the prosecution had failed to call the identification parade officer and that such failure was prejudicial to the appellant. It was therefore the position adopted by the appellant that the SCJ ought to have invoked s. 114(g) of the Evidence Act 1950 for failure by the prosecution to call the said witness nor offered the said witness to the defence.

[44] The law pertaining to s. 114(g) of the Evidence Act was well explained in the Federal Court case of *Ghasem Hozouri Hassan v. PP* [2018] 6 CLJ 133 per MD Raus Sharif CJ delivering the judgment of the court as follows:

> [48] The law pertaining to s. 114(g) of the Evidence Act is settled. Under s. 114(g) of the Evidence Act 1950, the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. The usage of the word 'may' gives the discretion to the court whether or not to invoke the adverse inference to a given set of facts. It is not a mandatory inference. To draw an adverse inference against the prosecution, the court must be satisfied that the witness that was not offered was a material witness, the prosecution purposely withholds evidence which it possessed and which was always available; and that what the prosecution did was done with an ulterior motive to frustrate the defence. (*Nanda Kumar Kunyikanan & Anor v. PP* [2011] 8 CLJ 406).

[45] Further, in the case of *Siew Yoke Keong v. PP* [2013] 4 CLJ 149; [2013] 4 MLRA 99 the Federal Court had succinctly laid down that witnesses for prosecution are indispensable only insofar as they are necessary in establishing a prosecution's case beyond a reasonable doubt as follows:

> Anyway, in the context of s. 114(g) of the Evidence Act, learned counsel's submission brought into focus the issue of the prosecutorial discretion in the calling of witnesses in a criminal prosecution. It is well settled that in a criminal case, **the prosecution, provided that there is no wrong motive, has a discretion as to what witnesses should be called by it** (see *Khoon Chye Hin v. PP* [1961] 1 LNS 41; [1961] MLJ 105, CA, *Adel Muhammed El Dabbah v. Attorney General of Palestine* [1944] AC 156, *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1). However, *that prosecutorial discretion must be subject to the most basic limitation that it has to produce all the*

necessary evidence to prove the case against the accused beyond reasonable doubt (see *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19; [1985] 2 MLJ 16, at 19, (SC)). Thus, in *Teoh Hoe Chye v. PP & Another Case* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386; [1987] 1 MLJ 220, Abdul Hamid CJ (Malaya) (as he then was) said at p. 388 (CLJ); 229 (MLJ):

> Nevertheless, the decision whether to call or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution (*Abdullah Zawawi Omar v. Public Prosecutor*). In so far as the trial Court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi Omar*'s case).
>
> [43] In other words, **in the end it is the sufficiency of the evidence that matters**. In the present appeal, we find no such unsatisfactory features or gap in the prosecution's case. Indeed, as is clear in this judgment and for reasons which we have explained we are satisfied that the learned trial judge was right in holding that a *prima facie* case of trafficking in dangerous drugs had been made out against Siew.
>
> (emphasis added)

[46] Considering the evidence on record as a whole, the evidence of the identification parade officer is not essential to the unfolding of the narrative upon which the prosecution is based. SP6 had in this case identified the appellant by way of dock identification. As such, failure by the prosecution to call the identification parade officer as witness was not material so as to set aside the conviction against the appellant.

[47] There was no evidence to suggest that the prosecution had attempted to withhold any material evidence or deliberately refused to produce the witness or offer him to the defence. In my judgment, on the evidence before this court, I cannot accept the position taken by the defence that the failure to call the identification parade officer or offer him to the defence would trigger an adverse inference under s. 114(g) of the Evidence Act 1950, thus it is my finding that the SCJ was correct in not invoking the adverse inference under s. 114(g) of the Evidence Act against the prosecution.

[48] Having carefully scrutinised the prosecution evidence as it stood at the end of prosecution case, I find that the trial judge having applied maximum evaluation was right in concluding that the prosecution had established its case beyond reasonable doubt at the end of prosecution case. The fact that the evidence of SP6 was supported by other material particulars, establishes him as a credible witness. The learned trial judge found as a fact that SP6 was a credible witness and he found no reason not to believe him.

A **Consideration Of The Defence**

[49] For the proper determination of this appeal, it is important to bear in mind that in accordance with the provision under s. 3 of the CPC, the appellants must be tried according to the provisions of the Code. In this regard, the duty of a trial court at the conclusion of the defence case was
B clearly set out in s. 182A of the CPC which reads as follows:

> 182 A - Procedure at the conclusion of the trial
>
> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved
C its case beyond reasonable doubt.

[50] In *Md Zainudin Raujan v. PP* [2013] 4 CLJ 21; [2013] 3 MLJ 773, the Federal Court observed as follows:

> At the conclusion of the trial, s. 182A of the Criminal Procedure Code imposes a duty on the trial court to consider all the evidence adduced
D before it and to decide whether the prosecution has proved its case beyond reasonable doubt. The defence of the accused must be considered in the totality of the evidence adduced by the prosecution, as well as in the light of the well - established principles enunciated in *Mat v. Public Prosecutor* [1963] 1 LNS 82; [1963] 1 MLJ 263 with regard to the approach to be taken in evaluating the evidence of the defence.
E

[51] The approach to be taken in the evaluation and assessment of the defence evidence by the trial court was as encapsulated in the case of *Mat v. PP* [1963] 1 LNS 82; [1963] 29 MLJ 263, where it was held by Suffian J (as he then was) as follows:

F The position may be conveniently stated as follows:

> (a) If you are satisfied beyond reasonable doubt as to the accused's guilt
>
> Convict.
>
G (b) If you accept or believe the accused's explanation
>
> Acquit.
>
> (c) If you do not accept or believe the accused's explanation
>
> Do not convict but consider the next steps below.
>
H (d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt
>
> Convict.
>
> (e) If you do not accept or believe the accused's explanation but
I nevertheless it raises in your mind a reasonable doubt as to his guilt
>
> Acquit.

[52] The approach in *Mat v. PP* (*supra*) was judicially endorsed by the Federal Court as being the correct one to adopt when evaluating the evidence of the defence case in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393. Should a statutory presumption arise against the accused, it is incumbent for such a presumption to be rebutted on a balance of probabilities.

[53] Upon scrutinising the record of appeal, it is my finding that the defence put up by the appellant merely rejects the prosecution's evidence without any evidence in support of the defence. The learned SCJ had in his decision found that the defence raised by the appellant was a mere afterthought and a bare denial in view of the lack of evidence to show that SP6 was a hyperactive and a mischievous person as alleged by the appellant.

[54] The learned SCJ had further in his finding found that both witnesses for the accused, SD1 and SD2, as not credible in view of the contradiction in their evidence. SD1 had in his evidence confidently state that his wife, SD2 was unemployed. This runs contrary to evidence of SD2 whom had stated that she was working as a teacher. The learned SCJ having observed the demeanour of SD1 opined that SD1 often stuttered and was hesitant in giving his evidence and that he was always anxious during cross-examination which had aroused suspicion.

[55] Since the trial judge had the audio-visual advantage in evaluating the credibility of witnesses, an appellate court would not normally interfere with the finding unless there are clear contradictions or discrepancies from the rest of the evidence. In this case before me, there are little if any, material contradictions or discrepancies.

[56] In view of the above findings, I agree with the SCJ's decision that the appellant's defence did not raise a reasonable doubt on the prosecution's case and as such the appellant was correctly convicted for the offence as charged.

Conclusion

[57] For the reasons adumbrated above, I see no reason to disturb the factual finding of the SCJ. The SCJ had judicially appreciated the evidence very carefully in a way that leaves no margin of doubt in my mind that the conviction of the appellant is safe. In all the circumstances, and based on the reasons discussed, I accordingly at the end of the appeal came to the inevitable conclusion that the respondent's case against the appellants based on the charge against them had been proved beyond a reasonable doubt. I therefore dismiss the appeal by the appellant.